

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY	:	
	:	
Filing to increase Unbundled Loop	:	02-0864
and Nonrecurring Rates.	:	

ORDER REOPENING PROCEEDING AND RESUSPENDING RATES

By the Commission:

On December, 24, 2002, Illinois Bell Telephone Company ("Illinois Bell" or "Ameritech Illinois" or "SBC Illinois" or the "company") filed its Ill. C. C. No. 20, Part 19, Section 2, 5th Revised Sheet No. 1.1, 4th Revised Sheet No. 23, 3rd Revised Sheet No. 29.1, 4th Revised Sheet No. 31, 6th Revised Sheet No. 33, 2nd Revised Sheet No. 33.1, 4th Revised Sheet No. 34, Part 19, Section 3, 3rd Revised Sheet No. 39.1, 5th Revised Sheet No. 41, 4th Revised Sheet No. 42, 2nd Revised Sheet No. 43, Part 19, Section 15, 5th Revised Sheet No. 8, 1st Revised Sheet No. 8.1, 5th Revised Sheet No. 9, 6th Revised Sheet No. 10, 3rd Revised Sheet No. 11, 1st Revised Sheet No. 11.1, 3rd Revised Sheet No. 12, 3rd Revised Sheet No. 13, 3rd Revised Sheet No. 14, 3rd Revised Sheet No. 15, 3rd Revised Sheet No. 16, 3rd Revised Sheet No. 17, Part 19, Section 20, 5th Revised Sheet No. 3, 5th Revised Sheet No. 4, 1st Revised Sheet No. 4.1, Original Sheet No. 4.2, 5th Revised Sheet No. 5, 1st Revised Sheet No. 5.1, 1st Revised Sheet No. 5.2, 1st Revised Sheet No. 5.3, 2nd Revised Sheet No. 6, 1st Revised Sheet No. 6.1, 1st Revised Sheet No. 6.2, 1st Revised Sheet No. 6.3, 1st Revised Sheet No. 6.4, 1st Revised Sheet No. 6.5, 1st Revised Sheet No. 6.6, 1st Revised Sheet No. 6.7, 1st Revised Sheet No. 7, 1st Revised Sheet No. 8, 1st Revised Sheet No. 9, 1st Revised Sheet No. 10, Part 19, Section 21, 3rd Revised Sheet No. 41, 6th Revised Sheet No. 43, and 3rd Revised Sheet No. 44, hereinafter collectively referred to as "Filed Rate Schedule Sheets" in which it proposes an increase in unbundled loop and nonrecurring rates, to be effective February 8, 2003.

On December 30, 2002, the Commission, having received and considered a Staff Report recommending suspension of the tariff pages in question, entered an order suspending the tariffs, further stating, in response to SBC's request that the matter be completed in six months, rather than the statutorily-permitted eleven, as follows:

The review of this revised filing, which includes new cost models, the pre-filed direct testimony of thirteen witnesses and extensive supporting documentation, will require a time consuming review. Moreover, due to the impact of the Filed Rate Schedule Sheets on wholesale rates and the competitive market, the Commission anticipates that competitive carriers and consumer advocates will intervene in this Docket. It is imperative that all of the parties to this proceeding have sufficient time to conduct their analysis in order to provide a complete record on which the Commission

will base its decision. As to the setting of a schedule in this docket, the Commission agrees that the Administrative Law Judge should set the schedule for this case after gathering input from all interested parties pursuant to the Commission's rules of practice. The expedited entry of this Suspension Order will facilitate this process, as the case can be docketed, an Administrative Law Judge assigned, and a status hearing held as soon as possible.

Suspension Order at 3-4

Proceedings were duly convened, petitions to intervene received and granted, a schedule set, discovery conducted, and Staff and intervenor direct testimony duly filed. At this juncture, however, the Illinois General Assembly enacted P.A. 93-5, adding Sections 13-408 and 13-409 to the Illinois Public Utilities Act ("Act"). Section 13-408 provides that:

Unbundled network element rates. This Section applies to and covers certain unbundled network element rates that shall be charged by incumbent local exchange carriers that are subject to regulation under an alternative regulation plan under Section 13-506.1 of this Act. The General Assembly finds and determines that it should provide direction to the Illinois Commerce Commission regarding the establishment of the monthly recurring rates that such incumbent local exchange carriers shall charge other telecommunications carriers for unbundled loops, whether provided on a standalone basis or in combination with other unbundled network elements, in order to ensure (i) that such rates are consistent with the requirements of the federal Telecommunications Act of 1996, the regulations promulgated thereunder, and subsection (g) of Section 13-801 of this Act, and (ii) that such incumbent local exchange carriers are able to recover the efficient, forward-looking costs of creating, operating, and maintaining the network outside plant infrastructure capacity and switching and transmission network capacity necessary to permit such incumbent local exchange carriers to meet in a timely and adequate fashion the obligations imposed by Section 8-101 of this Act.

In order to ensure recurring unbundled network element rates for loops that accomplish these objectives, the Illinois Commerce Commission shall set the recurring rates affected incumbent local exchange carriers receive for unbundled loops, whether provided on a standalone basis or in combination with other unbundled network elements, in accordance with the requirements delineated below.

(a) Fill factors. The General Assembly directs that the Illinois Commerce Commission shall **employ fill factors** (the proportion of a facility or element that will be "filled" with network usage) that

represent a reasonable projection of actual total usage of the elements in question, in accordance with applicable federal law. The General Assembly finds that **existing actual total usage** of the elements that affected incumbent local exchange carriers are required to provide to competing local exchange carriers, as reflected in the current actual fill factors for the elements in question, is the most reasonable projection of actual total usage. The Commission, therefore, shall employ current actual fill factors that reflect such existing actual total usage on a going forward basis in establishing cost based rates for such unbundled network elements. In addition, **the Commission shall adjust all existing Commission-approved rates for unbundled loops, whether provided on a standalone basis or in combination with other unbundled network elements, that are currently in effect to make such rates consistent with this provision.**

(b) Depreciation rates. The General Assembly further directs that the Commission shall employ **depreciation rates** that are forward-looking and based on **economic lives as reflected in the incumbent local exchange carrier's books of accounts** as reported to the investment community under the regulations of the Securities and Exchange Commission. Use of an accelerated depreciation mechanism shall be required in all cases. Use of a depreciation rate based on historical rate-of-return regulation derived lives of the elements and facilities in question shall be prohibited. In addition, **the Commission shall adjust all existing Commission-approved rates for unbundled loops, whether provided on a standalone basis or in combination with other unbundled network elements, that are currently in effect to make such rates consistent with this provision.**

(c) The rate adjustments required by subsections (a) and (b) of this Section must be completed within 30 days of the effective date of this Section. In the case of any incumbent local exchange carrier that is subject to an alternative regulation plan under Section 13-506.1 at the time this Section becomes effective, in making these rate adjustments, **the Commission shall determine the specific required adjustments with respect to fill factors and depreciation lives by employing the models and methodology used to generate the proposed rates submitted by such an incumbent local exchange carrier in ICC Docket 02-0864.** The Commission proceedings initiated to establish such adjusted rates shall be deemed interconnection agreement arbitration and approval proceedings under Sections 252(b) and (e) of the federal Telecommunications Act of 1996. Immediately upon conclusion of such proceedings, all existing interconnection agreements in this

State of affected incumbent local exchange carriers shall be deemed amended to contain the adjusted rates established in such proceedings. In addition, immediately upon conclusion of such proceedings, all wholesale tariffs, currently effective in this State, of affected incumbent local exchange carriers shall be deemed amended to contain the adjusted rates established in such proceedings. In accordance with these provisions, immediately upon the establishment by the Commission of the adjusted rates covered hereby, each affected incumbent local exchange carrier shall charge such adjusted rates, to the extent applicable, for all of the network element products that are provided to other carriers, whether those products are provided under an interconnection agreement or a tariff. **The proceeding in ICC Docket 02-0864 is hereby abated as of the effective date of this amendatory Act of the 93rd General Assembly.**

(d) Notwithstanding anything to the contrary contained in Section 13-505.1 of this Act, unbundled network element rates established in accordance with the provisions of this Section shall not require any increase in any retail rates for any telecommunications service.

P.A. 93-5, Section 5, *enrolled as* 220 ILCS 5/13-408 (effective May 9, 2003) (emphasis added)

Pursuant to the foregoing provision, SBC filed on May 12, 2003, a petition to adjust all of its existing Commission-approved rates for unbundled loops in accordance with the statutory directive that “[t]he rate adjustments required by subsections (a) and (b) of . . . Section [13-408] must be completed within 30 days of the effective date of this Section”, and we duly convened a new proceeding, entitled Illinois Bell Telephone Company: Petition to Determine Adjustments to UNE Loop Rates Pursuant to Section 13-408 of the Illinois Public Utilities Act, Docket No. 03-0323. Also pursuant to the statutory mandate, the Commission entered an order setting adjusted rates for unbundled loops on June 9, 2003. See, *Order, Illinois Bell Telephone Company: Petition to Determine Adjustments to UNE Loop Rates Pursuant to Section 13-408 of the Illinois Public Utilities Act*, Docket No. 03-0323 (June 9, 2003). In between the filing of tariffs establishing new rates for unbundled loops and the Commission’s June 9, 2003 rate order in docket 03-0323, the Commission on May 21, 2003, dismissed the instant proceeding, consistent with the statutory mandate abating it, and canceled the tariffs at issue.

The Commission’s actions under the statute were subsequently challenged in the federal District Court for the Northern District of Illinois. See Voices for Choices, et al. v. Illinois Bell Telephone Co., et al., 03 C 3290 (N.D. Ill. 2003). On June 9, 2003, Judge Charles J. Kocoras entered a Memorandum Opinion preliminarily enjoining the Commissioners and SBC from implementing Section 13-408 of the Act, determining that the new legislation was expressly contrary to federal law. Voices for Choices, et al. v.

Illinois Bell Telephone Co., et al., 03 C 3290, 2003 U.S. Dist. Lexis 9548 at 29-30, (N.D. Ill. 2003) (June 9, 2003). The Commission, consistent with the terms of the injunction, took no further actions regarding the implementation of Section 13-408. None of the parties to the instant case took action in the instant docket. Instead, Judge Kocoras' order, having been converted to a permanent injunction by agreement of the parties to facilitate prompt appeal, was appealed by SBC to the United States Court of Appeals for the Seventh Circuit. AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al., 03 – 2735; 03 – 2766 (consol.) (7th Cir. 2003). Following briefing and argument, the Court of Appeals on November 10, 2003, issued an opinion affirming the District Court's injunction, thereby permanently enjoining the Commission's enforcement of Section 13-408. AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al., 03–2735; 03–2766, -- F.3d. --, 2003 U.S. App. Lexis 22961 at 22 *et seq.*, (consolidated)(7th Cir. 2003).

In interpreting Judge Kocoras' injunction, the Court determined that:

The ICC also is compelled by the injunction to reinstate the proceeding in its Docket 02-0864, which the state law had terminated, and to proceed to decision as expeditiously as possible. The ICC must attempt to produce a rate that complies with TELRIC as of 2003--and if doing this entails use of SBC's current fill factors, the ICC is free to use them. **And it must do this speedily.** A rate that is long out of date, as this 1997 rate is, frustrates the goals of TELRIC every bit as much as does a rate generated under the flawed state legislation. SBC and its rivals alike are entitled to an updated rate that comports with federal law.

AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al., 2003 U.S. App. Lexis 2

DISCUSSION

Given the holding of the 7th Circuit Court of Appeals, the Commission finds itself in a situation which is novel in the extreme and which is without any clear precedent to guide the Commission's prospective actions. While it is clear that the Commission must, and by this Order does, reinstate this proceeding, the status of the rate schedules canceled by the Commission is far from clear. At the time of the cancellation of the tariffs, the Commission had discretionary authority to suspend those tariffs for an additional 6 months. As noted above, at the time of the cancellation of the tariffs and the abatement of this docket only the first round of testimony had been filed in the case. Accordingly, but for the directives contained in sections 13-408 and 13-409, the Commission would most probably have entered an order resuspending these tariffs for an additional period of time not exceeding six months. Given the undeveloped state of the record in this case, the complexity of the issues, and in order to comply with the District Court's injunction as explained by the Circuit Court of Appeals, the Commission determines that to the extent it is within the Commission's power to resuspend SBC's proposed rates, it is appropriate to suspend the proposed tariffs in this case for an additional six months starting with the entry of this Order on December 16, 2003. While

existing rates may well be, as postulated by the Court of Appeals, “long out of date” the Commission is unable to say that the proposed rates are just and reasonable in the absence of a fully developed record. The Commission would further note that while the Commission is not under any specific deadline for the entry of a final order in this case, either by statute or under the terms of the injunction, it will endeavor, as it ordinarily does, to enter its final order at the end of the resuspension period established by this order (June 16, 2004), thereby ensuring that TELRIC-compliant rates are established expeditiously as is practicable given the state of the record.

In seeking to comply with Judge Kocoras’ injunction, as interpreted by the Court of Appeals, the Commission is confronted with several issues impacting the Commission’s compliance with the Court’s direction. First and foremost of these issues is the effect of the federal District Court’s decision in Voices for Choices, et al. v. Illinois Bell Telephone Co., et al. and the Court of Appeal’s decision in AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al on this reopened proceeding. Although, as noted above, the Commission is acting to some extent on its interpretation of these decisions, the Commission believes it appropriate to provide any party the opportunity to brief any issues regarding these decisions or our interpretation of them at the outset of this reopened docket.

The second issue to which we allude is the Court of Appeals’ recent decision in Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, v. Bie, et al., 340 F.3d 441; 2003 U.S. App. LEXIS 16514 (7th Cir. 2003). There, the court determined that federal law preempts the state of Wisconsin’s requirement that the ILEC tariff its UNE rates. Bie, 340 F.3d at 444. While we do not offer any opinion as to how this matter affects our Illinois requirements, we nonetheless take cognizance of this ongoing matter and direct the parties to brief this issue at the outset of this reopened docket. We observe that both the U.S. District Court, which enjoined our enforcement of Section 13-408, and the Court of Appeals, which affirmed the District Court’s order, appear to have issued their rulings with the understanding that this proceeding was and is an arbitration conducted pursuant to Section 252(b) of the federal Act. AT&T v. Illinois Bell, -- F.3d. --, 2003 U.S. App. Lexis 22961 at 6-7; Voices for Choices, 2003 U.S. Dist. Lexis 9548 at 10. The Commission notes, however, that this case was not brought before the Commission by petition of a carrier or other party pursuant to Section 252(b)(1) of the federal Act, or, indeed, in a manner consistent with the rules established to govern federal arbitrations. See 83 Ill. Admin. Code Part 761. Rather, this proceeding began as a tariff investigation pursuant to Section 9-201 of the Public Utilities Act, resulting from SBC’s filing a tariff that seeks to increase its tariffed UNE loop rates. Accordingly, some interested party may well challenge any order the Commission may enter in this proceeding, based upon its interpretation of the holding in Bie. Accordingly, the proper scope and application of the Bie holding appear to us to be vital matters in this proceeding and the Commission will expect detailed argument from the parties on this point to be conducted at the outset of this reopened proceeding.

Accordingly, and pursuant to the order of the Circuit Court, we reopen this proceeding for the purpose of giving effect to the decisions of the United States District

Court in Voices For Choices v. Illinois Bell Telephone, 2003 U.S. Dist. LEXIS 9548 (N.D. Ill. Jun. 9, 2003) and the United States Court of Appeals in AT&T Communications of Illinois, Inc., v. Illinois Bell Telephone Co., Nos. 03-2735 & 03-2766, (7th Cir. Nov. 10, 2003). Mindful of the Court of Appeals' admonition that this reopened proceeding should "proceed to decision as expeditiously as possible", (AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al., 2003 U.S. App. Lexis 22961 at *24) the Commission intends to proceed to decision as expeditiously as possible, giving due consideration to the issues ultimately presented in this reopened docket and the interests of all parties.

The Commission directs that a status hearing be convened at an early date to determine the scheduling of this proceeding based upon SBC's filings in accordance with this order. The Administrative Law Judge assigned, having heard the intentions of the parties, may then seek from us, if necessary, further direction upon the manner in which to proceed.

As a final matter, as noted earlier, on May 21, 2003, the Commission voted to dismiss this proceeding and to cancel the tariffs filed on December 24, 2002, that are the subject of this docket. Given the District Court's injunction as interpreted by the Court of Appeals, the Commission has reason to believe that its dismissal of the proceeding and cancellation of the tariffs was improper under federal law and that given this change in the facts and law of the case, the case should be also be reopened for the purpose of rescinding the Commission's action in dismissing this docket and canceling the tariffs. Quantum Pipeline Co. v Illinois Commerce Comm'n, 304 Ill. App. 3d 310, 319 (3rd Dist. 1999).

FINDINGS AND ORDERING PARAGRAPHS

It appears from consideration of the Court of Appeals Order and other relevant data that:

1. This matter should be and is hereby reopened in order to comply with the permanent injunction entered by federal Judge Kocoras in U.S. Dist. Ct. No. 03 C 3290 and to rescind the May 21, 2003 action taken by the Commission in dismissing this proceeding and canceling the December 24, 2002 tariffs which are the subject of this docket;
2. The tariffs that are the subject of this case should be, and hereby are, resuspended for a period not to exceed six months from the date of the issuance of this order;
3. A status hearing should be set in this matter at an early date, at which time a schedule should be set pursuant to which the parties shall, inter alia, submit detailed briefs and argument at the outset of this reopened proceeding regarding the effect that the federal District Court's decision in Voices for Choices, et al. v. Illinois Bell Telephone Co., et al., the Court of Appeal's decision in AT&T Communications of Illinois, et al. v.

Illinois Bell Telephone Co., et al and the Circuit Court of Appeals for the Seventh Circuit's decision in the Bie case may have on this proceeding;

4. The Administrative Law Judge assigned may, if necessary, seek from the Commission further direction upon the manner in which to proceed.

IT IS THEREFORE ORDERED THAT this matter is hereby reopened for the purpose of giving effect to the decisions of the United States District Court in Voices For Choices v. Illinois Bell Telephone, 2003 U.S. Dist. LEXIS 9548 (N.D. Ill. Jun. 9, 2003) and the United States Court of Appeals in AT&T Communications of Illinois, Inc., v. Illinois Bell Telephone Co., Nos. 03-2735 & 03-2766, (7th Cir. Nov. 10, 2003) and to rescind the May 21, 2003 action taken by the Commission in dismissing this proceeding and canceling the December 24, 2002 tariffs which are the subject of this docket;

IT IS FURTHER ORDERED THAT the December 24, 2002 tariffs which are the subject of this docket are resuspended for a six month period ending June 16, 2004;

IT IS FURTHER ORDERED THAT all parties hereto shall be given notice of such reopening;

IT IS FURTHER ORDERED THAT a status hearing shall be set in the matter at an early date, at which time a schedule shall be set pursuant to which the parties shall, inter alia, submit detailed briefs and argument at the outset of this reopened proceeding regarding the effect that the federal District Court's decision in Voices for Choices, et al. v. Illinois Bell Telephone Co., et al., the Court of Appeal's decision in AT&T Communications of Illinois, et al. v. Illinois Bell Telephone Co., et al and the Circuit Court of Appeals for the Seventh Circuit's decision in the Bie case may have on this proceeding;

IT IS FURTHER ORDERED THAT the Administrative Law Judge assigned may, if necessary, seek from us further direction upon the manner in which to proceed;

IT IS FURTHER ORDERED THAT this order is not final and is not subject to the Administrative Review Act.

By Order of the Commission this 16th day of December, 2003.

(SIGNED) EDWARD C. HURLEY
Chairman